UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

WATERMELONS PLUS, INC.

and Case No. 29-CA-27150

MICHAEL SPENCE, An Individual

WATERMELONS PLUS, INC.

and Case No. 29-CA-27152

DAVID PETERS, An Individual

James Kearns, Esq., Counsel for the General Counsel

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York on January 24, 2006. The charge in 29-CA-27150 was filed by Michael Spence on August 29, 2005 and the charge in 29-CA-27152 was filed by David Peters on August 30, 2005. A Consolidated Complaint was issued by the Regional Director on November 29, 2005. This alleged:

- 1. That since in or about February 2005, Local 342 United Food and Commercial Workers Union, has been engaged in organizing certain employees of the Employer.
- 2. That the Union filed a petition for an election on March 15, 2005 in Case No. 29-RC-10339.
- 3. That on or about March 14 and 15, 2005, the Respondent, by Anthony Pagano, Jr. interrogated employees about their union activities.
- 4. That on March 15, 2005, the Respondent, for discriminatory reasons, discharged Michael Spence and David Peters.

Neither the Employer nor its counsel appeared at the hearing. Counsel for the General Counsel stated on the record that he had received a phone call from Alfred DeMaria, the Company's attorney who stated that he would not appear at the hearing; albeit he was not requesting a postponement. The General Counsel also stated that DeMaria told him that his client would probably not appear at the hearing.

Based on the entire record, including my observations of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following

Findings and Conclusions

I. Jurisdiction

The Complaint alleges and the Respondent's Answer admits that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 342 United Food and Commercial Workers Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The Respondent is a New York corporation that is engaged in the non-retail sale and distribution of fruits and vegetables. In 2004 it entered into a contract to provide foods to public schools in the city of New York. It operates a warehouse type of facility with a large refrigerated storage room. It employs about 70 workers.

The Company is an enterprise that is owned and managed by the Pagano family. There is also an affiliated trucking company called Wings Trucking Inc., which is also owned by the family and is a single employer with the Respondent. ¹

According to the testimony of Spence and Peters, the son, Anthony Pagano Jr., is the person who is in charge of the warehouse and who directs and gives orders to the warehouse employees. The testimony shows that he is involved in the hiring of employees, the setting of wage rates and wage increases and that he permits employees to take time off when requested. In short, the uncontested evidence establishes that he is a supervisor and agent of the Respondent within the meaning of Sections 2(11) and (13) of the Act.

The testimony shows that the Union began to organize the employees in or about late February 2006 when its representatives started appearing outside the Company's premises. The testimony also showed that in the early part of March 2005, Anthony Pagano Jr., observed employees talking to union representatives during the lunch break by stationing himself outside the doors of the facility leading to a parking lot.

On or about March 1, 2005, the Respondent solicited its employees to sign a document that read:

To whom it may concern:

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As an employee of Wings Trucking, Inc., I do not wish to be represented nor do I wish to join any labor union. I have consented to sign this statement voluntary (sic) and I have not been compelled in any manner to agree and sign this statement to avoid any repercussions. ²

Spence and Peters testified that on numerous occasions in March 2005, they were told

¹ On September 9, 2005, the Respondents Watermelons Plus, Inc and Wings Trucking Inc., executed a settlement agreement that was approved by the Regional Director on September 21, 2005. This settlement was in relation to charges and a Consolidated Complaint that alleged among other things that the two companies constituted a single employer and that they illegally discharged four other employees on March 15 and 16, 2005.

² In the previously settled case, this was alleged s an 8(a)(1) violation and it was remedied.

by Anthony Pagano Jr. that they should not talk to the Union; that the Company could not afford a union; and that any employees who joined the Union would be fired.

By March 15, 2005, the Union obtained sufficient authorization cards to file a petition for an election. In this regard, the Union set up a meeting at a local diner for the early morning of March 15, 2005 and filed its petition, in 29-RC-10339, on the same day. In turn, the petition was faxed to the Employer by the Regional Office. The fax transmittal receipt shows that it was received by the Respondent on March 15 at 1:46 p.m.

Spence testified that on March 15 when he arrived at work, Anthony Pagano Jr. asked him how the union meeting went and he responded, "Fine." (Spence and Peters did not actually go to the Union meeting that day).

At about noon, Spence and Peters went out of the facility to have lunch. When they returned, they finished up their day's work. Sometime in the afternoon, and probably soon after the Company received the NLRB petition, both were separately told by Anthony Pagano Jr. that they were being let go. ³ The evidence was that these employees had never received any prior disciplines or warnings and there is no evidence to suggest that there was any economic downturn in the Company's business. In short, there was no evidence to rebut the General Counsel's prima facie case under *Wright Line*, that these two individuals were discharged in retaliation for the employees' union activities, specifically triggered by the Company's receipt of the petition for an election filed with the NLRB.

Based on the above, I conclude that the Respondent violated Section 8(a)(1) & (3) of the Act when it discharged employees Spence and Peters on March 15, 2005. I also conclude that it violated Section 8(a)(1) of the Act when Anthony Pagano Jr. interrogated Spence about the Union meeting that was held earlier in the morning.

Remedy

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Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended: 4

ORDER

The Respondent, Watermelons Plus Inc., its officers, agents, successor, and assigns, shall

- 1. Cease and Desist from
- (a) Discharging employees because of their union membership, activities or support.

³ Spence testified that he was told that he was being laid off somewhere around 3 p.m. when he went to tell Pagano that he finished with his tasks and was going home.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (b) Interrogating employees about their union membership or activity.
- (c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their Section 7 rights.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer Michael Spence and David Peters, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.
- (b) Make whole, with interest, the employees named above for the loss of earnings they suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against the above named employees and within three days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.
 - (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- 30 (e) Within 14 days after service by the Region, post at its facilities in Brooklyn, New York, copies of the attached notice marked "Appendix." ⁵ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 15, 2005.

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⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

| | (f) Within 21 days after service by the R certification of a responsible official on a form protection that the Respondent has taken to comply. | egion, file with the Regional Director a rovided by the Region attesting to the s | sworn steps that |
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| 5 | Dated, Washington, D.C., February 8, 2006. | | |
| 10 | | Raymond P. Green Administrative Law Judge | |
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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

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To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise retaliate against our employees because of their union membership or support.

WE WILL NOT interrogate employees about their union membership or activities.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

- WE WILL offer Michael Spence and David Peters who have been found to have been illegally discharged, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.
- WE WILL make whole the employees named above for the loss of earnings they suffered as a result of the discrimination against him.
 - **WE WILL** remove from our files any reference to the unlawful discharges that have been concluded to be unlawful and notify the employees in writing that this has been done and that these actions will not be used against them in any way.

| | | | Waterme | elons Plus, Inc. | |
|----|-------|----|------------------|------------------|--|
| | | | (Employer) | | |
| 40 | Dated | Ву | | | |
| | | | (Representative) | (Title) | |

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov. National Labor Relations Board, One MetroTech Center, Jay Street and Myrtle Avenue, Brooklyn, NY 11201-4201 718 330 2862. Hours: 9 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 860-240-3528.

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